

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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JUL 19 2006

CLERK, U.S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY DEPUTY

10 **UNITED STATES BANKRUPTCY COURT**  
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 In re: ) BANKRUPTCY CASE NO. 93-05609-H11  
13 JOSEPH V. CARACCILO, ) ADVERSARY CASE NO. 05-90348-H11  
14 Debtor. )  
15 ) MEMORANDUM DECISION  
16 JACK WIREMAN and )  
17 RONALD THOMPSON, )  
18 Plaintiffs, )  
19 v. )  
20 JOSEPH V. CARACCILO, )  
21 Defendant. )

22 Jack Wireman and Ronald Thompson ("plaintiffs") move to  
23 dismiss the second amended third and fourth counterclaims (the  
24 "counterclaims") of Joseph V. Caracciolo ("debtor" or  
25 "defendant"), pursuant to Federal Rule Civil Procedure ("FRCP")  
26 12(b)(1) and (6).

27 At issue is 1) whether this Court has subject matter  
28 jurisdiction over defendant's counterclaims and 2) whether the

1 counterclaims should be dismissed because they are based upon a  
2 void reaffirmation agreement.

3 This Court has jurisdiction to determine this matter  
4 pursuant to 28 U.S.C. §§ 1334 and 157(b) (1) and General Order  
5 No. 312-D of the United States District Court for the Southern  
6 District of California. This is a core proceeding pursuant to  
7 28 U.S.C. § 157(b) (2) (A) and (I).

8 I.

9 BACKGROUND

10 A. THE UNDERLYING BANKRUPTCY CASE

11 Debtor filed his voluntary chapter 11 bankruptcy petition on  
12 May 25, 1993. The deadline to file a dischargeability complaint  
13 was August 24, 1993. The claims bar date was December 31, 1993.  
14 Debtor admits in his answer to this adversary proceeding that  
15 plaintiffs were not scheduled as creditors and that the alleged  
16 debt owed to them was not scheduled as a claim. It is undisputed  
17 that plaintiffs were neither scheduled as creditors nor did they  
18 file a proof of claim.

19 In November 1994, debtor's reorganization plan was  
20 confirmed. On January 7, 1995, this Court entered a Notice of  
21 Entry of Confirmation of Plan and Discharge which provides that  
22 the discharge voids any judgment based on a discharged debt  
23 against debtor and enjoins the commencement or continuation of  
24 any action to collect on a claim against debtor that arose prior  
25 to the entry of the Confirmation Order. A final decree and order  
26 closing the case was entered on September 20, 2001.

27 B. THE MALICIOUS PROSECUTION LAWSUIT

28 Well over a year after debtor's plan was confirmed, the

1 plaintiffs filed a lawsuit in the San Diego Superior Court  
2 against various parties, including but not limited to, the debtor  
3 and Rolling Hills Estates, Ltd. ("RHE"), a limited partnership,  
4 seeking damages for malicious prosecution (the "MPL"). The MPL  
5 arose from a previous lawsuit filed by various defendants in the  
6 MPL (with the exception of debtor) against plaintiffs alleging  
7 that plaintiffs conspired with the Rainbow Municipal Water  
8 District to deny sewer services to defendants' properties and, in  
9 doing so, violated their civil rights (the "SLAPP lawsuit"). The  
10 SLAPP lawsuit was terminated in plaintiffs favor on or about  
11 October 1992, and a judgment entered on or about April 15, 1993,  
12 prior to debtor's bankruptcy filing. The judgment and subsequent  
13 award of costs was upheld by the court of appeal.<sup>1</sup> [see docket  
14 #32, RJN Exh. P, Statement of Decision issued by the San Diego  
15 Superior Court dated July 23, 1997].

16 Debtor filed an answer in the MPL and as a twentieth and  
17 separate affirmative defense, he claimed that plaintiffs were  
18 barred from recovering from him since all obligations owing to  
19 them were discharged in his bankruptcy. [Id. at Exh. N, 8:15-  
20 23). On July 21, 1997, the MPL came on for trial "as to the  
21 remaining defendant Joseph Caracciolo" as all other defendants  
22 had either settled or were defaulted. The superior court found  
23 that debtor was a general partner in RHE, and even though he was  
24 not a named plaintiff in the SLAPP lawsuit, "he controlled RHE  
25 and was one of the key principals controlling the prior action.  
26 The evidence is unrefuted that Caracciolo was fully responsible

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27  
28 <sup>1</sup> The appellate court evidently did not render a decision until March  
1995 after the debtor's plan had been confirmed. [see RJN, Exh. K and L].

1 on behalf of RHE in retaining counsel and pursuing the  
2 litigation." [Id. Exh. P, 2:15-21]. The superior court further  
3 found that the SLAPP lawsuit "was commenced at the direction of  
4 Caracciolo, was terminated in plaintiffs' favor, and was brought  
5 without probable cause." [Id. at 3:1-2]. The court rejected  
6 debtor's alleged defenses and awarded plaintiffs damages. On  
7 August 18, 1997, judgment was entered in favor of plaintiffs in  
8 the amount of \$1,045,303.31 with an offset for the prior  
9 settlements in the amount of \$825,000 leaving the total amount  
10 awarded against several parties, including debtor, at  
11 \$266,270.35.

12 C. THE ADVERSARY COMPLAINT

13 Plaintiffs filed this adversary complaint against defendant  
14 on August 11, 2005, alleging that the judgment received in the  
15 MPL was nondischargeable under 11 U.S.C. § 523(a)(3) and (6).  
16 Plaintiffs amended their complaint on September 16, 2005.  
17 Defendant answered on September 26, 2005, and then filed an  
18 Answer and Amended Counterclaim on January 1, 2006. Thereafter,  
19 defendant filed a Second Amended Answer and Counterclaims. The  
20 third and fourth counterclaims are at issue in this motion and  
21 are as follows:

22 THIRD COUNTERCLAIM: In the third counterclaim for relief,  
23 the defendant seeks a judgment for contempt damages arising out  
24 of an alleged oral binding contract,<sup>2</sup> entered into between  
25

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26 <sup>2</sup> The alleged oral contract arose sometime after June 12, 1997.  
27 Defendant contends that he accepted plaintiffs' proposed specific terms of a  
28 settlement regarding the MPL that amounted to a covenant not to execute on the  
judgment. The terms were that plaintiffs would dismiss their punitive damages  
claims and limit execution of any judgment received to certain "litigation

1 defendant and plaintiffs, that plaintiffs would not seek to  
2 enforce or collect the malicious prosecution judgment against  
3 defendant. As a result of this breach, defendant seeks an amount  
4 not less than \$177,788.39.

5 FOURTH COUNTERCLAIM: Under the fourth counterclaim,  
6 defendant contends that plaintiffs are estopped from collecting  
7 the judgment due to the oral contract.

8 II.

9 DISCUSSION

10 A. STANDARDS FOR DISMISSAL UNDER FRCP 12(b)(1)

11 "[I]n passing on a motion to dismiss, whether on the ground  
12 of lack of jurisdiction over the subject matter or for failure to  
13 state a cause of action, the allegations of the complaint should  
14 be construed favorably to the pleader." City of Las Vegas, Nevada  
15 v. Clark County, Nevada, 755 F.2d 697, 700 (9th Cir. 1985)  
16 (citation omitted); Don Bricker Construction, Inc. v. Duffy (In  
17 re Eads), 135 B.R. 387, 391 (Bankr. E. D. Cal. 1991) ("The  
18 factual allegations are construed favorably to the pleader and  
19 are accepted as true, unless denied or controverted by the  
20 movant.") (citation omitted). "In most cases, '[a] complaint may  
21 be dismissed on jurisdictional grounds only if it appears beyond

22 \_\_\_\_\_  
23 assets", including rights to certain insurance policies and claims against  
24 third parties. These assets were not available to any other creditors of the  
25 Estate and this resolution would ensure that the actions of plaintiffs would  
26 not damage the estate. In exchange for these promises, defendant allegedly  
27 agreed to conduct a limited defense at trial and cooperate with collection  
28 against certain "litigation assets" consisting of insurance policies and  
claims against third parties that would not adversely affect the bankruptcy  
estate in full satisfaction of the judgment. According to defendant, at  
plaintiffs' insistence, the covenant not to execute was not reduced to  
writing. Defendant also alleges that in December 2003, plaintiffs breached  
the alleged covenant not to execute. See Second Amended Answer and  
Counterclaims 15:¶¶ 10, 14.

1 doubt that the plaintiff can prove no set of facts in support of  
2 his claim which would entitle him to relief.'" Premium of Amer.  
3 v. Sanchez (In re Premium Escrow Serv., Inc.), 342 B.R. 390  
4 (Bankr. D.C. 2006) (treating arguments under 12(b)(1) in the same  
5 way as it would an argument raised in a rule 12(b)(6)) (citation  
6 omitted). "The burden of proof is on the party asserting  
7 jurisdiction." Eads, 135 B.R. at 391 (citations omitted).

8 1. SUBJECT MATTER JURISDICTION: ARGUMENTS OF THE PARTIES

9 Plaintiffs, relying on In re Castlerock Properties, 781 F.2d  
10 159 (9th Cir. 1986), argue that the Court does not have  
11 jurisdiction over the third and fourth counterclaims since they  
12 are nothing more than breach of contract claims under state law.  
13 Plaintiffs next contend the counterclaims are not within the  
14 Court's related to jurisdiction and cite In re Fietz, 852 F.2d  
15 455 (9th Cir. 1988). According to plaintiffs, since debtor  
16 brings these counterclaims twelve years after his plan was  
17 confirmed and five years after the case was closed, the outcome  
18 cannot "conceivably have any effect on the estate being  
19 administered." Any recovery by the debtor will have absolutely  
20 no impact on the plan or any creditors.

21 Defendant responds that because the alleged oral agreement,  
22 or covenant not to execute, was an agreement by the parties to  
23 resolve their disputes regarding the interpretation and  
24 enforcement of both the discharge and the injunction ordered by  
25 this Court and the dischargeability of a claim, disputes  
26 regarding the covenant not to execute are within this Court's  
27 core jurisdiction. In the alternative, defendant relies on  
28 Pegasus Gold Corp. v. Goldin (In re Pegasus Gold Corp.), 394 F.3d

1 1189, 1194-95 (9th Cir. 2005) and argues that this Court has  
2 supplemental jurisdiction over the claims since they are related  
3 to the core claims.

4 In reply, plaintiffs contend that defendant's own allegation  
5 describing the oral agreement makes no mention of  
6 dischargeability, the plan of reorganization, or any other  
7 bankruptcy related issue. Plaintiffs also argue that this Court  
8 does not have supplemental jurisdiction since defendant's state  
9 law counterclaims arise from the verbal agreement that occurred  
10 in June 1997, and the conduct breaching said agreement in 2001.  
11 Conversely, plaintiffs' dischargeability complaint arises from  
12 the fact that before 1993, defendant maliciously prosecuted a  
13 lawsuit against the plaintiffs and should have provided  
14 plaintiffs with actual notice of his bankruptcy proceeding.  
15 Thus, plaintiffs contend that the state and federal claims do not  
16 arise from a common nucleus of operative facts.

17 Both parties submitted supplemental briefs which emphasized  
18 points they had made in their prior pleadings.

19 a. CORE JURISDICTION

20 A bankruptcy court has jurisdiction over all "civil  
21 proceedings arising under title 11, or arising in or related to  
22 cases under title 11." 28 U.S.C. § 1334(b). A case "arises  
23 under" Title 11 and is within the core jurisdiction of the court  
24 when the cause of action is based on a right or remedy expressly  
25 provided in the Bankruptcy Code, such as "order to turn over  
26 property of the estate," and "proceedings to determine, avoid, or  
27 recover preferences." Pegasus Gold, 394 F.3d at 1193. Defendant  
28 argues that the third and fourth counterclaims are with this

1 Court's core jurisdiction because the alleged covenant not to  
2 execute was an agreement by the parties to resolve their disputes  
3 regarding the § 524 injunction and dischargeability of a claim.  
4 Defendant pleads in the third counterclaim that the covenant not  
5 to execute "is a binding oral contract between Plaintiffs and  
6 Caracciolo with regard to enforcement of the discharge granted by  
7 the Court." [See para. 21 of Second Amended Answer]. The fourth  
8 counterclaim also relates to this alleged oral agreement.  
9 Although the Court would analyze the alleged agreement according  
10 to state contract law,<sup>3</sup> accepting the defendant's allegations as  
11 true, the central purpose of the agreement is directly related to  
12 the debtor's discharge and the discharge injunction, both of  
13 which arise under Title 11. Therefore, arguably, the  
14 counterclaims are within this Court's core jurisdiction.  
15 Moreover, as set forth below, if the alleged agreement involved a  
16 previously discharged debt, this Court's core jurisdiction is  
17 implicated because of the requirements for reaffirmation  
18 agreements under 11 U.S.C. § 524(c).

19 b. "RELATED TO" JURISDICTION

20 "The bankruptcy court also has jurisdiction over a much  
21 broader set of cases: those proceedings that are 'related to' a  
22 bankruptcy case." Pegasus Gold, 394 F.3d at 1193. "The Ninth  
23 Circuit has adopted the 'Pacor test' for determining the scope of  
24 'related to' jurisdiction." Id. (citation omitted).

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26  
27 <sup>3</sup> See Rains v. Flinn (In re Rains), 428 F.3d 893, 901 (9th Cir. 2005)  
28 (finding that California law applied to the validity of settlement regarding  
debtor's discharge) (citations omitted).



1       The Pacor test is whether:

2           the outcome of the proceeding could  
3           conceivably have any effect on the estate  
4           being administered in bankruptcy.... An  
5           action is related to bankruptcy if the  
6           outcome could alter the debtor's rights,  
7           liabilities, options, or freedom of action  
8           (either positively or negatively) and which  
9           in any way impacts upon the handling and  
10          administration of the bankrupt estate.

11       Id. (citation omitted).

12           In the post-confirmation context, however, the Ninth Circuit  
13       noted that "the Pacor formulation may be somewhat overbroad."

14       Id. at 1194. Therefore, the Ninth Circuit adopted the "close  
15       nexus" test for post-confirmation "related to" jurisdiction,  
16       "because it recognizes the limited nature of post-confirmation  
17       jurisdiction but retains a certain flexibility...." Id. Under  
18       the "close nexus" test, a bankruptcy court would have post-  
19       confirmation "related to" jurisdiction if there is a close nexus  
20       to the bankruptcy plan or proceeding "sufficient to uphold  
21       bankruptcy jurisdiction over the matter." Id. at 1194. Further,  
22       by way of example, matters affecting the interpretation,  
23       implementation, consummation, execution, or administration of the  
24       confirmed plan will typically have the requisite close nexus.

25       Id. (citation omitted).

26           In Pegasus, the court easily found the "close nexus" test  
27       satisfied because the majority of the claims, even though they  
28       asserted state tort and contract claims involving post-  
29       confirmation conduct, would require the court to interpret the  
30       plan and a settlement agreement that was approved by the  
31       bankruptcy court in order to resolve the claims. Here, it's  
32       undisputed that the alleged agreement was not approved by this

1 Court. However, it's possible that this Court may have to  
2 interpret the plan regarding the scope of the discharge vis-a-vis  
3 parties in the plaintiffs' position.

4 Nonetheless, even though there may not be a "close nexus" to  
5 the bankruptcy plan, there is at minimum a "close nexus" with the  
6 bankruptcy proceeding. Although the bankruptcy was filed as a  
7 chapter 11, at this juncture of the case, the only issue concerns  
8 the debtor's discharge under § 727(a) since he is an individual.  
9 The Ninth Circuit has stated that "[a] bankruptcy court's  
10 "related to" jurisdiction is very broad, 'including nearly every  
11 matter directly or indirectly related to the bankruptcy.'"

12 Sasson, 424 F.3d at 868 (citation omitted). Another court noted  
13 that "there may also be matters related to the debtor's fresh  
14 start which could be 'related to' proceedings." Evans & Assoc.,  
15 CPAs, Inc. v. Macnichol (In re Macnichol), 240 B.R. 731 (Bankr.  
16 S.D. Ohio 1999). Further, even under Pegasus Gold, the Court had  
17 noted that the "close nexus" test retains a certain flexibility  
18 thereby implying that post-confirmation matters, concerning the  
19 discharge of an individual who filed a chapter 11, would fall  
20 within the scope of this Court's "related to" jurisdiction.  
21 Construing the allegations of the counterclaims favorably towards  
22 defendant, this Court finds that it has "related to"  
23 jurisdiction over defendant's third and fourth counterclaims.

24 "As subject-matter jurisdiction can be reconsidered and  
25 second-guessed at any point in the litigation, including on  
26 appeal, consideration of the alternative theory of  
27 jurisdiction--supplemental jurisdiction--is warranted." Eads,  
28 135 B.R. at 392.

1           c.   SUPPLEMENTAL JURISDICTION

2           This Court may exercise its supplemental jurisdiction<sup>4</sup>  
3 over the counterclaims if they involve a common nucleus of  
4 operative facts and would ordinarily be expected to be resolved  
5 in one proceeding. In Pegasus, there were some claims that had  
6 only a tangential relationship to the underlying proceeding.  
7 With the remaining claims, the Ninth Circuit noted that a  
8 bankruptcy court may exercise its supplemental jurisdiction under  
9 28 U.S.C. § 1367 over bankruptcy claims, even when subject matter  
10 jurisdiction is based on "related to" bankruptcy jurisdiction."  
11 Id. at 1995. Thus, even though claims may have a tangential  
12 relationship to the underlying proceeding, if they involve a  
13 "common nucleus of operative facts and would ordinarily be  
14 expected to be resolved in one proceeding," the bankruptcy court  
15 could exercise its supplemental jurisdiction. See also Sasson v.  
16 Sokoloff (In re Sasson), 424 F.3d 864, 868-69 (9th Cir. 2005)  
17 (noting that the bankruptcy court's related to jurisdiction "also  
18 includes the district court's supplemental jurisdiction... 'over  
19 all other claims that are so related to claims in the action with  
20 [the court's] original jurisdiction that they form part of the  
21 same case or controversy...." (citation omitted)).

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22  
23           <sup>4</sup> The Court notes that the Fietz case was decided before Congress  
24 enacted 28 U.S.C. § 1367(a) codifying the principles of ancillary and pendent  
25 jurisdiction, now called "supplemental jurisdiction." "Ancillary jurisdiction  
26 implements the doctrine that a court with jurisdiction over a case may  
27 entertain subject matter over which it would otherwise lack jurisdiction  
28 whenever the matter must be considered to do full justice of the case." Eads,  
135 B.R. at 393 (citation omitted). Under ancillary jurisdiction, "the  
nonfederal claim must be logically related to the primary lawsuit." Id. at  
394. "Pendent jurisdiction is premised on the existence of a relationship  
between the federal claim and the state claim that, under the facts of the  
case, 'permits the conclusion that the entire action before the court  
comprises but one constitutional 'case.'" Id.

1       28 U.S.C. section 1367(a) states in relevant part:

2           Except as provided in subsections (b) and (c)  
3           or as expressly provided otherwise by Federal  
4           statute, in any civil action of which the  
5           district courts have original jurisdiction,  
6           the district courts shall have supplemental  
7           jurisdiction over all other claims that are  
8           so related to claims in the action within  
9           such original jurisdiction that they form  
10          part of the same case or controversy under  
11          Article III of the United States  
12          Constitution.

13       A federal claim and a state law claim form part of the same  
14       Article III case or controversy if the two claims "'derive from a  
15       common nucleus of operative fact' such that 'the relationship  
16       between [the federal] claim and the state claim permits the  
17       conclusion that the entire action before the court comprises but  
18       one constitutional 'case.'" Chicago v. Int'l Coll. of Surgeons,  
19       522 U.S. 156, 164-165, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997)  
20       (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86  
21       S.Ct. 1130, 16 L.Ed.2d 218 (1966)) (alteration in original).

22       Plaintiffs' first amended complaint demonstrates that their  
23       claims against defendant, and defendant's third and fourth  
24       counterclaims against plaintiffs, revolve around the same fact  
25       pattern. Plaintiffs allege that the MPL judgment is  
26       nondischargeable, while defendant alleges that the so-called  
27       covenant not to execute was a "settlement" of the MPL. The Court  
28       acknowledges that the plaintiffs' claims and the defendant's  
29       counterclaims arise out of two separate events. Nonetheless,  
30       construing the facts alleged in defendant's favor, because his  
31       discharge is directly implicated by the existence and/or validity  
32       of the alleged agreement, the testimony underlying the  
33       plaintiffs' claims will undoubtedly overlap with the defendant's.

1 This Court has exclusive jurisdiction over plaintiffs'  
2 dischargeability complaint and because defendant's counterclaims  
3 arise out of some of the same operative facts, the parties claims  
4 would ordinarily be tried in one judicial proceeding. Therefore,  
5 defendant's counterclaims not only fall within the scope of this  
6 Court's "related to" jurisdiction, but its supplemental  
7 jurisdiction as well. Finally, the purpose behind exercising  
8 supplemental jurisdiction--to resolve all related claims in one  
9 action--is evident here.

10 B. STANDARDS FOR DISMISSAL UNDER FRCP 12(b)(6)

11 The standards for dismissal under 12(b)(6) are essentially  
12 the same as those for 12(b)(1). In resolving a 12(b)(6) motion,  
13 the court must (1) construe the complaint in the light most  
14 favorable to the plaintiff; (2) accept all well-pleaded factual  
15 allegations as true; and (3) determine whether plaintiff can  
16 prove any set of facts to support a claim that would merit  
17 relief. See Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-  
18 338 (9th Cir. 1996). Any purported defect alleged by the moving  
19 party must be apparent on the face of the complaint. Levine v.  
20 Diamantheset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1991).

21 1. VOID REAFFIRMATION AGREEMENT: ARGUMENTS OF THE PARTIES

22 Plaintiffs contend that even if this Court does not dismiss  
23 the counterclaims under 12(b)(1), this Court must dismiss them  
24 under 12(b)(6) since the purported covenant not to execute is  
25 nothing more than a reaffirmation agreement and is void.  
26 Plaintiffs contend that none of the requirements for a valid  
27 reaffirmation agreement are met pursuant to 11 U.S.C. § 524(c).  
28 Plaintiffs maintain that the allegations in the counterclaims

1 confirm that the agreement was an improper reaffirmation since  
2 defendant's allegations in paragraphs 10 and 14 demonstrate that  
3 the consideration for the purported covenant not to execute is in  
4 whole, or in part, the judgment which is allegedly dischargeable.

5 Defendant argues that it is premature for this Court to  
6 dismiss the counterclaims under 12(b)(6) because the Court has  
7 yet to determine whether the debt is dischargeable or not.

8 a. ANALYSIS

9 The Court agrees that it is premature to dismiss the  
10 counterclaims under 12(b)(6) at this juncture. Reaffirmation  
11 agreements only pertain to discharged debts. That issue has not  
12 yet been decided. Thus, plaintiffs' motion to dismiss the  
13 counterclaims on this theory are premature.

14 III.

15 CONCLUSION

16 The Court denies plaintiffs' motion to dismiss under  
17 FRCP 12(b)(1) or 12(b)(6) for the reasons stated above.

18 This Memorandum Decision constitutes findings of fact and  
19 conclusions of law pursuant to Federal Rule of Bankruptcy  
20 Procedure 7052. The defendant is directed to file with this  
21 Court an order in conformance with this Memorandum Decision  
22 within ten (10) days from the date of entry hereof.

23  
24  
25 Dated: July 19, 2006

  
26 JOHN J. HARGROVE  
27 United States Bankruptcy Judge

28 S:\WIREMAN V. CARACCIOLO.wpd

**UNITED STATES BANKRUPTCY COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**  
325 West F Street, San Diego, California 92101-6991

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In re: Bankruptcy Case No. 93-05609-H11  
Adversary Proceeding Case No: 05-90348-H11

**CERTIFICATE OF MAILING**

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

**MEMORANDUM DECISION**

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

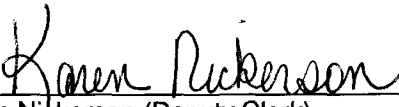
**Attorney(s) for Plaintiffs:**

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**4350 La Jolla Village Drive, 7th Floor**  
**San Diego, CA 92122-1246**

Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on July 19, 2006.

  
\_\_\_\_\_  
Karen Nickerson (Deputy Clerk)  
Judicial Assistant to the Honorable John J. Hargrove